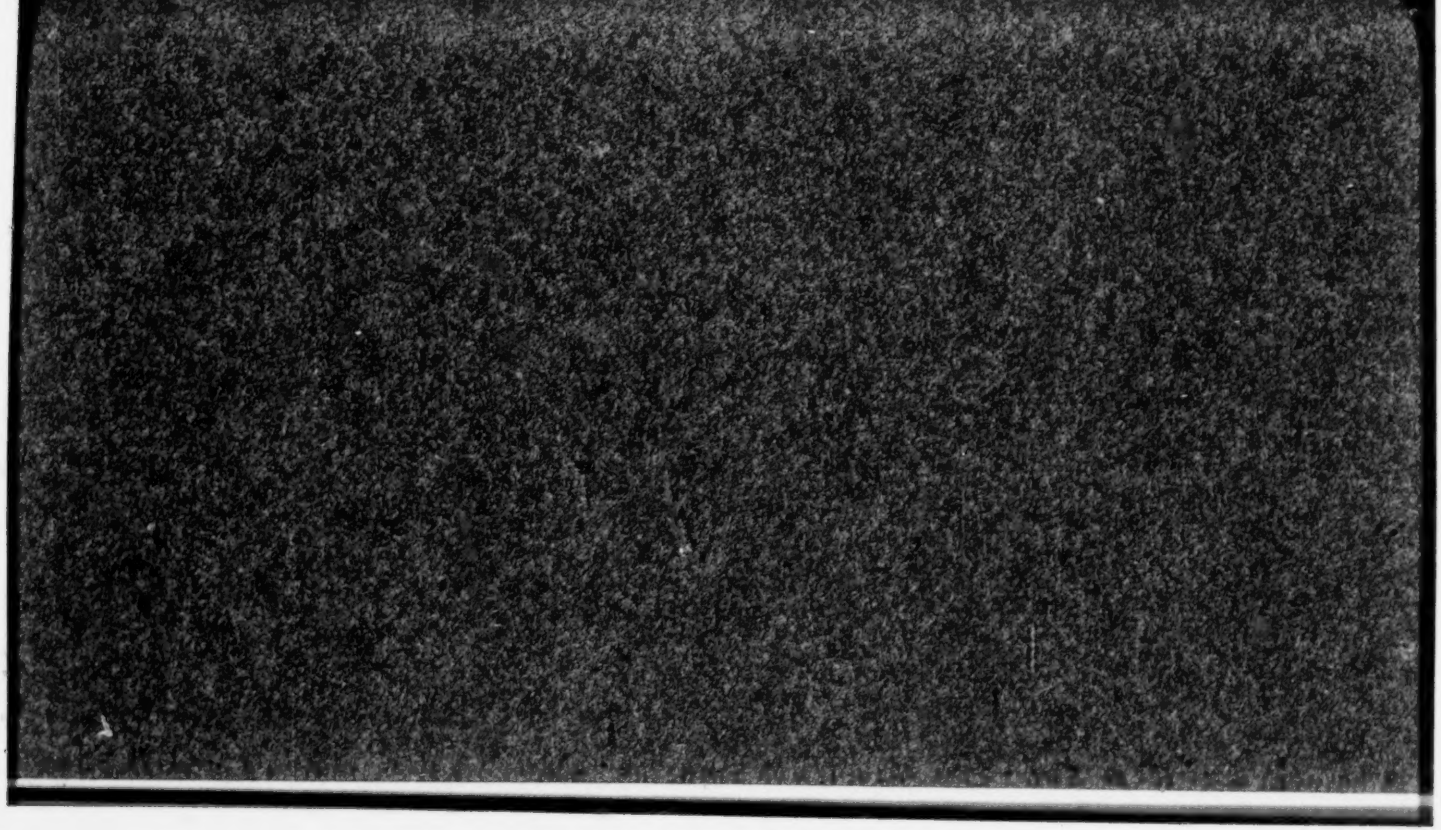

INDEX.

AUTHORITIES.

Cases—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

THE MATTHEW ADDY COMPANY, petitioner, v. UNITED STATES OF AMERICA. } No. 84.

BENJAMIN FORD, PETITIONER, v. UNITED STATES OF AMERICA. } No. 85.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The Congress of the United States, by the Act of August 10, 1917 (40 Stat. 276, 284), commonly known as the "National Defense Act" or the "Lever Act," authorized the President to fix the price of coal and coke wherever and whenever sold either by producer or dealer and to establish rules and regulations for the production, sale, shipment, distribution, apportionment, and storage thereof among dealers and consumers both domestic and foreign. Acting

under this authority, the President, on August 23, 1917, issued an Executive order designed to regulate dealing in coal by middlemen. The first paragraph of this order defines the term "coal jobber" as "a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle, or yard." The second paragraph which fixed the margin that might be charged by dealers in bituminous coal was as follows:

> For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 lbs., nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2,000 lbs. (General Orders, Regulations, and Rules of the United States Fuel Administration, p. 444.)

The Matthew Addy Company, the petitioner here and the defendant below, was engaged in business as a coal jobber in the city of Cincinnati, Ohio, during the months of September and October of 1917. It was convicted upon a number of counts of an indictment, each of which alleged that subsequent to August 23, 1917, it had made certain specific sales of coal and in each case had added a "profit or gross margin" of 25 cents per ton, which it well knew to be in excess of the "profit or gross margin" allowed by the Executive order and regulations.

A motion to quash the indictment and a demurrer were overruled prior to the trial. (Rec. 21, 23.) The opinions of the court are reported in 263 Fed. 449 and 265 Fed. 424.

The several questions raised by the defendant in the courts below and the contentions urged by its counsel in their brief in this court, will sufficiently appear in the course of the following argument which in its outline adopts the analysis of counsel for the defendant.

The principal issue involved is whether the war power of Congress extends to the fixing of prices which may be charged for "necessaries." This is now of little popular interest, but is of vital concern to the Government. Should the United States, unhappily, become involved in another great war, Congress would immediately turn to the pronouncements of this court to ascertain the scope and extent of its constitutional power. A limitation thereof, marked by a decision in this case adverse to the Government, might well prove more effective for our enemies than an Army Division or a Battle Squadron.

(By a stipulation filed, a single brief is submitted in Nos. 84 and 85. The references herein made to the Record are to the Transcript in No. 84.)

ARGUMENT.

I.

The Executive order of August 23, 1917, applied to sales for which the defendant was indicted.

The President of the United States, acting under the powers conferred upon him by section 25, para-

graph (1), of the National Defense Act (Lever Act, approved August 10, 1917, 40 Stat. 276, 284), issued an Executive order on August 23, 1917, which provided (paragraph (2)):

> For the buying and selling of bituminous coal a jobber *shall not add* to his purchase price *a gross margin* in excess of 15¢ per ton of 2,000 pounds * * *. [Italics ours.]

It is here contended that the defendant, which added a margin of 25¢ per ton after August 23, did not violate this order, for the reason that the coal sold was *purchased* by it in the preceding July.

The language of the order is so plain and unambiguous that no extrinsic aids are necessary to its construction. It provides that a jobber "*shall not add*" an excessive margin, and a violation of it occurs when he does add such margin. The margin is added when he makes his sale, and the language of the order clearly applies to all cases where this is done after the date of the order.

> Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. (Mr. Justice Day in *United States* v. *Standard Brewery*, 251 U. S. 210, at 217.)

The defendant, however, contends that because the words "for buying and selling" are used the *buying* is made an element or part of the offense and

the order does not apply unless the coal be *bought* after the date of the order. By this contention it is sought to prove that the order, so applied, would be retroactive and would amount in substance to an *ex post facto* law. The error lies in the assumption that the buying of coal is an element or part of the offense of violating the order. It is merely a circumstance or condition which must exist before a violation of the order can occur. It is not an element of the offense in the sense that it is a step in the violation of the order.

There is a clear distinction between those facts, circumstances, and conditions which must exist before a crime can be committed and those acts which constitute the crime itself. The former are essential elements in the proof of the crime, while the latter are essential elements of the crime itself.

In the instant case the buying of coal was not a part of the offense of violating the order, which by its terms was applicable whenever an excessive margin was *added* by a jobber after August 23, 1917. The order was retro-*spective* in the sense that any similar order is retrospective; but it was not retro-*active* or *ex post facto* in its operation upon the defendant.

It is further contended, however, that notwithstanding the clear language of the order it ought not to be applied to any coal purchased prior to August 23, because such application would be confiscatory and render the order unconstitutional. It is said

that a jobber must expend money in buying as well as in selling and the fixing of a margin of 15¢ per ton would be confiscatory in cases where more than 15¢ had already been spent in the buying alone. The constitutionality of the order will be dealt with in another place. It is sufficient here to point out that the effect is no different from that of the Executive order of August 21, 1917, which fixed the prices of bituminous coal at the mine. On that date the operators may have had on hand coal which had been mined and ready for market but not sold. The cost of producing that coal had been expended. The application of the price-fixing order to that coal might appear to be confiscatory. Yet it would not be seriously urged that the Executive order did not apply to that coal.

> The construction of the order contended for would discriminate as against the mine owner and in favor of the jobber * * *. Such a construction would violate the obvious purpose of the act. (Peck, District Judge, Opinion on Motion for New Trial, Rec. 25.)

The effect of the Executive order of August 23 upon coal which the defendant had already purchased is exactly the same as that of the Volstead Act, which became immediately effective upon beer lawfully manufactured and ready for sale at the time of its approval. With respect to this effect, Mr. Justice Brandeis said, in *Ruppert* v. *Caffey*, 251 U. S. 264, at p. 301:

> Hardship resulting from making an act take effect upon its passage is a frequent incident

> of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the law-making body.

It is further urged by the defendant that the acts charged in the indictment were not in violation of any order in effect during August and September, when the sales complained of were made, but were within the purview of another order made October 6, 1917. (Paragraph (9) of order of October 6, 1917, printed in petitioner's brief, pp. 84–87.) It is argued that the issuance of this order "shows conclusively that prior to that date it was not considered an offense for a jobber who had purchased coal prior to August 23 to sell the same at any price obtainable in the market." (Brief, p. 15.) A careful reading of that order, however, shows that it does not apply to the case, and that the conclusion drawn from its promulgation is not warranted. The order reads:

> A jobber who, at the time of the President's order fixing the price of the coal in question at the mine (August 21, 1923), had contracted to buy coal *at or below the President's price*, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission as determined by the President's regulation of August 23, 1917. [Parentheses and italics ours.]

This order applied only to such jobbers as had contracts under which they would receive coal "at or below the President's price." It was designed to

prevent such jobbers from taking advantage of their favorable contracts and of the President's price by increasing their selling price to the President's price plus 15¢. The defendant had no such contract. Its contract of July 31 was at $3.25 per ton. (Rec. 39.) The President's price on such coal was $2.00 per ton. The order of October 6, 1917, did not apply to their contracts, but had quite a different scope and purpose.

If it were necessary, as we believe it is not, to go beyond the four corners of the order to determine its intent and proper application, the conclusion, found in the circumstances existing in August, 1917, is irresistible. The progress of the World War, then in its third year, had demonstrated to everyone that its successful prosecution required not only the development of an effective fighting force in France and upon the seas, but the marshaling of every available agricultural, commercial, and industrial resource of the country. The withdrawal of millions of men from productive enterprise and the unparalleled demands for food and fuel created a situation which threatened disaster unless effectively controlled by the strong arm of governmental regulation. Not only was there a shortage of fuel in the United States but there was a critical scarcity in the supply of our Allies. We were in the midst of one of the most protracted coal strikes in the history of the country, which was not settled until the last days of October. The greater portion of the coal mined and available

for distribution had been sold by the producers and was being held by jobbers.

In this grave emergency, Congress passed the National Defense Act and vested in the President power and authority during the emergency to control the sale and distribution of food and fuel. The President's orders pursuant to this act followed with startling rapidity. In 11 days came the order fixing the price of bituminous coal at the mine. And two days later followed the order fixing the jobbers' margins. Nothing but the compelling force of a great crisis would serve either to explain or justify this celerity. That the crisis existed and that it demanded immediate, certain, definite, and effective action was not then and is not now doubted.

In the distribution of fuel it was imperative that the prices which the jobbers might exact from the public should be regulated, for they controlled the available supply; and it was equally imperative that those prices should relate to all coal then remaining unsold in the jobbers' hands. Otherwise, the tardy effect of the regulatory power would not be manifest until the following year.

> Unless jobbers' margins with reference to then-existing contracts were regulated, it remained open to the jobber to demand what he could get for his coal, and to thus carry on the injurious speculation, manipulation, and private control of the supply which the act was designed to prevent. (Peck, District Judge, on Motion for a New Trial, Rec. 25,

and Knappen, Circuit Judge, on Writ of Error, Rec. 87.)

In this situation the Executive order of August 23 was issued forbidding any jobber to *add* to his purchase price more than 15¢ per ton. There had been no limitation placed by the statute upon Executive action. The authority given was to fix prices of coal wherever and whenever sold. To assume that the President voluntarily curtailed this power and declined to use effectively the weapon placed in his hands by Congress for the relief of a distressed, frightened, and indignant people is utterly unwarranted.

The defendant insists, however, that to argue upon the assumption that the President knew that most of the season's coal was in the hands of jobbers "is not a permissible method of legal reasoning for the construction of a law creating a criminal offense." (Brief p. 18.) On the contrary, we believe that a study of the conditions existing at the time of the enactment of a remedial statute is one of the surest guides to its true intent and purpose. The evils then existing for which the act is an appropriate remedy may properly be considered in its interpretation.

In *Holy Trinity Church* v. *United States*, 143 U. S. 457, which required the construction of a penal statute, Mr. Justice Brewer said (p. 463):

> Another guide to the meaning of a statute is found in the evil which it is designed to

remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

To the same effect are:

United States v. *Union Pacific R. R. Co.*, 91 U. S. 72, 79.

Texas & Pacific Ry. Co. v. *I. C. C.*, 162 U. S. 197, 210, 218.

Selective Draft Law Cases, 245 U. S. 366.

Virginia Coupon Cases, 25 Fed. 666.

We think it clear that the buying of coal was not part of the offense charged in the indictment, which consisted solely of adding an excessive margin; that the application of the President's order of August 23 to the sales made by the defendant does not make that order operate retroactively; that the plain and unambiguous language of the order applies to such cases; and, in the light of the circumstances existing at the time of the order, the only reasonable interpretation which can be placed upon it renders it applicable to such cases.

II.

Evidence offered to prove that the gross margin fixed by the Executive order would not allow the defendant any profit was properly excluded.

During the course of the trial in the District Court the defendant offered to prove by the testimony of an accountant that the cost to it of buying and selling the coal referred to in the indictment was more

than 15¢ per ton and that if it added but 15¢ to its purchase price it would sell at a loss. (Rec. 56, 57, 33.) In its general charge the Court in effect instructed the Jury that the word "profit" as used in the indictment was synonymous with "gross margin," and that it was not incumbent upon the Government to show that the defendant had received a net profit of more than 15¢ per ton. (Rec. 64.) Special charge No. 2, requested by the defendant, and framed to raise the same question, was refused. (Rec. 60, 61.) A review of these rulings is sought by the Third and Sixth Assignments of Error. (Rec. 70.)

The argument made in support of the admissibility of this testimony (Brief, 21–25) is not entirely clear. It is suggested that the President in fixing prices could act only through the Federal Trade Commission, and since this Commission when it acted was bound to consider operating costs and to allow a reasonable profit, evidence relating to such profit was admissible upon the indictment charging a violation of the President's order. (Brief, 25.) It will be noted at once that this position attacks the order as invalid because not properly made or promulgated. If well taken, it disposes of the case entirely by showing that the order alleged to have been violated was illegal and void. A discussion of this suggestion will therefore be deferred until we reach the rulings of the Court upon the motion to quash and the demurrer, where its consideration will be more appropriate.

It is also suggested that the order was unconstitutional if it be construed to deprive the defendant of a reasonable profit or to require it to sell coal at a loss. This also we set aside for discussion hereafter.

For a consideration of the admissibility of this evidence, divorced from the foregoing questions, we must assume that the President had power to act, as he did act, without the Commission. And we must assume also the constitutionality of the act and of the order. Upon these premises, was the evidence admissible?

We have first to consider the language of the order. It provides that "a jobber shall not add to his purchase price a gross margin in excess of 15¢ per ton." Not a word in the order suggests that he shall first be allowed his expenses and then a profit of 15¢. On the contrary, the words "gross margin" and "add to his purchase price" declare clearly and positively that nothing more shall be added than the margin of 15¢. Accordingly, there is nothing in the language of the order to warrant the Trial Court to enter upon an inquiry concerning costs and profits.

The defendant urges, however, that if the President be authorized to fix prices without the aid of the Federal Trade Commission, he is, nevertheless, bound to make the same inquiry concerning costs, profits, etc., as the Commission is bound to make before it may fix a price; and for this reason the Trial Court should consider evidence of costs and profits. (Brief, pp. 24–25.) But this is a patent *non sequitur*. Con-

ceding *arguendo* that the President was bound to investigate, it does not follow that in each prosecution for a violation of the order the Trial Court shall conduct such investigation. **Furthermore,** under this Record it must be conclusively presumed that the President made such investigation as the law obliged him to make, and that all of the conditions precedent to the issuance of the order have been met.

Furthermore, the quality and character of the proof offered did not make it admissible. The Trade Commission was not directed by the Statute to fix separate margins for each individual so that in every particular case a certain equal profit would be realized. On the contrary, the prices established were intended to apply generally to all producers or dealers in a given locality and to afford a fair profit only "under reasonably efficient management at the various places of production." (Section 25, paragraph (11), Act of August 10, 1917, 40 Stat. 276, 285.) Upon the trial of the case at bar there was no offer to prove what was a compensatory rate for the locality under reasonably efficient management, but merely to show that this particular defendant at a particular time would not be able to earn a profit on a gross margin of 15¢.

The Court, in disposing of the offer during the trial, correctly stated the law in these words:

> The regulation promulgated by the President in accordance with the act had the force and effect of law. Now, it is like a railroad rate, duly promulgated—it is not open to

> anyone to say that in a particular transaction, or in any month of transactions, the rate prescribed did not prove profitable to him. It is the rate that was prescribed by the Government of the United States in accordance, as has heretofore been held by the court, with due process of law; therefore, it is not for us to inquire whether, in this particular instance or in this particular month, and to this particular coal jobber, the rate prescribed was a profitable rate or not. The rate was binding upon all upon its promulgation. Accordingly, the evidence now proposed to be given as to the costs to this particular company, selling coal at this particular time, is not competent, and the objection to this will be sustained. (Rec. 57.)

The evidence offered was not competent upon any theory which the petitioner has advanced or which we can formulate; and the ruling of the Trial Court should be sustained.

III.

The indictment was sufficient.

A.

The President had power to fix prices without the aid or cooperation of the Federal Trade Commission.

The defendant contends that the power vested in the President by Section 25 of the Lever Act, to fix prices for coal, could be exercised by him only through the agency of the Federal Trade Commission, and that the indictment, in failing to allege

that the order was made in this manner, is fatally defective.

Section 25 of the act provides in its first paragraph (40 Stat. 284):

> That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment [it is] necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign: said authority and power *may* be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary. (Brackets and italics ours.)

This paragraph standing alone provides for the fixing of prices in two ways, either by the President acting alone or by the President acting through the Commission. The word "may," in its ordinary signification, is permissive. "It is * * * an auxiliary verb, qualifying the meaning of another verb, by expressing ability, * * * contingency, or liability, or possibility, or probability." (*United States* v. *Lexington Mill Co.*, 232 U. S. 399, 411; *Minor* v. *Mechanics Bank*, 1 Peters, 46.) The latter clause of the paragraph quoted merely authorizes the President

to act through the Commission if, in his discretion, he deems it propert o do so. It is * * * not a limitation or restriction of the power given in the preceding clauses. This the petitioner admits.

> If Paragraphs 1 and 17 had stood alone, without the inclusion of the intermediate paragraphs, the construction adopted by the District Court and approved by the Court of Appeals might have been necessary * * *. (Brief, 27.)

It is urged, however, that a consideration of the remainder of the section, and of the act, render it necessary to construe "may" to mean "shall." We think a study of the entire act leads to the contrary conclusion.

It is entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel." In the first section stands this broad grant (40 Stat. 276):

> The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act.

In the second section he is authorized to create and use any agency or agencies in carrying out the purposes of the Act. Section 5 authorizes him to license and regulate producers, dealers, and distributors of necessaries, and to find what charges are just and reasonable; and his findings are made prima facie evidence of reasonableness in any proceeding in court.

In like manner, Sections 10, 11, 12, 13, 14, 15, and 16 vest in him powers of the broadest and most drastic character. A reading of them leaves the mind convinced of the intent of Congress to confer upon the President plenary power to deal decisively, effectively, and swiftly with any emergency which may arise. There is not a syllable to support the theory that the exercise of his powers in the premises was to await the leaden feet of an administrative or judicial investigation.

Section 25 deals exclusively with fuel, probably the most essential of all the "necessaries" dealt with by the Act. The several paragraphs of this section have been printed and conveniently numbered in the Appendix to the Petitioner's Brief and our references will be to these. Paragraphs 2–5, inclusive, give the President power to requisition and take over the plant of any producer or dealer and provide a method of fixing the compensation to be paid. It is notable that in paragraph 3 the provision is—

> which compensation the President *shall fix* or *cause to be fixed* by the Federal Trade Commission. (Italics ours.)

Surely no construction could be placed upon these words which would deny to the President the power to act without the Commission.

Paragraphs 6–10 authorize the creation of a single agency for the purchase and sale of all fuel. And paragraphs 11–16, both inclusive, provide for investigations by the Commission, to be made "*when directed by the President.*"

Then follows the penal clause of this Section, which is a *separate* paragraph thereof, and which is as follows (40 Stat. 286):

> Whoever shall, with knowledge that the prices of any such commodity *have been fixed as herein provided, ask, demand, or receive a higher price*, or whoever shall with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine * * * or by imprisonment. * * * Each independent transaction shall constitute a separate offense. (Italics ours.)

It will thus be observed that the *penal section of this clause does not provide for punishment for violation of the prices fixed by the Federal Trade Commission, but punishment follows the violation of the price-fixing regulations as provided in this Act; that is, whether fixed by the President himself, by the President acting through the Federal Trade Commission, or by any agency created by the President for that purpose* (which last method was specifically authorized by Section 2 of the Act). The provisions of the penal section of the Act and its legislative history will be helpful to the court in construing the first paragraph of section 25.

This Act was first passed by the House, and before being passed by the Senate was amended in many particulars. The House having refused to accept the amendments, the bill was sent to conference. The

penal paragraph of this section of the Act as first passed by the Senate provided as follows:

> Whoever shall, with knowledge that the prices of any such commodity so fixed *by the Commission, ask, demand, or receive a higher price in violation of this section shall, upon conviction, be punished,* etc. (Congressional Record, 65th Cong., 1st Sess., Vol. 55, Pt. 5, p. 5362.)

The Conference Committee thereupon struck out the words "*So fixed by the Commission*" and substituted in lieu thereof the words "*Fixed as herein provided,*" and eliminated "*In violation of this section.*" (Congressional Record, 65th Congress, 1st Sess., Vol. 55, Pt. 6, p. 5735.)

It thus appears that Congress, before the final passage of this Act, amended and changed this penal paragraph, making it an unlawful violation to sell coal at prices in excess of those fixed as *provided in the Act, removing therefrom any references to prices fixed by the Federal Trade Commission under "this section," thus clearly showing that the Congress intended that the prices might be fixed either by the President or by any Board, Bureau, or Agency which the President might create under Section 2 of the Act for that purpose.*

It must be kept in mind, as hereinbefore set forth, that at the time the Act was passed and Executive order promulgated there was a critical condition in the coal industry of our country as well as that of our Allies. There was the great coal strike. Coal producers were selling their entire output at exorbitant prices. There was no necessity for the intervention

of a middleman or jobber. It was not desirable that broker or jobber should make an excessive profit for the rehandling of coal. In this situation it was not feasible and the Congress never intended that the whole coal business should be *first minutely investigated* by the Trade Commission before the prices should be fixed. When this Act was first introduced some two months before its passage the whole coal situation was not so acute, but when the Act was finally amended and passed the situation had changed, and it was necessary, in order to protect the public and aid in the successful prosecution of the war, that immediate remedial action should be taken by the President himself by the fixing of prices. The situation demanded immediate action. There was no time to redraw the whole Act but only to put it in such shape that the President could act without the delay which would be required for action by the Federal Trade Commission.

The reason urged by counsel for the Petitioner for applying a forced construction of the language of paragraph 1 is not satisfactory. Briefly stated, this reason is that in the subsequent paragraphs of the section Congress prescribes the procedure to be adopted by the Federal Trade Commission in case the President shall call upon it to fix prices of coal or coke, from which fact counsel asks the court to infer that Congress did not intend such prices to be fixed in any other manner. The only justifiable inference from these provisions is that Congress did

64597—23——4

not intend the *Federal Trade Commission* to fix prices in any other manner.

It is quite unwarrantable to use the limitation placed on the Federal Trade Commission's authority as an argument in favor of stripping the Chief Executive of the power which the plain language of the first paragraph of Section 25 had vested in him. To do so would, in fact, defeat the principal purpose of the statute.

There was an acute emergency with regard to fuel and danger of a runaway market, the evil consequence of which would extend far into the winter. So far as that emergency was concerned, the prime necessity was that fuel should be immediately placed under full Government control, *not that any particular procedure should be followed in fixing prices.* It is inconceivable that Congress intended that no action should be taken with regard to fuel prices until after the conclusion of a long and laborious investigation. What was needed was a complete, unhampered authority, concentrated where it could be exercised promptly and efficiently, and Congress vested that authority in the President of the United States in the full confidence that it would be exercised wisely and justly. The fact that it subsequently prescribed certain limitations upon the authority of a subordinate governmental agency warrants no inference of any intention to restrict the power of the President.

There was ample ground for the provisions with regard to the Federal Trade Commission without

resorting to the construction that it was to be a limitation upon the President's authority.

It was natural that when the proposal for Government control of the prices of coal and coke was made the fact that the Federal Trade Commission had been created and organized to make investigations and gather information which would be of value in such an enterprise should associate it with that proposal; and that Congress should wish the President to have authority to make full use of the information and experience of that body if he so desired.

But the Federal Trade Commission was the creation of a statute. It had no powers except those conferred by that statute, and the fixing of prices of any commodity was not among those powers. The reasonable explanation of the action of Congress in authorizing the President to exercise his power over fuel prices through the agency of the Federal Trade Commission is, therefore, not that it intended to limit him to the use of that agency but that it intended to give him power, *if he saw fit*, to require of the Commission the performance of a duty which the law of its creation not only did not impose upon it, but did not authorize it to perform.

And thus from a reading of the entire Act, from a consideration of its policy and purpose, and from a glimpse of its legislative history, we return to the crystal language of the grant of power to the President, not only without having found any reason for altering it, but with a firm and settled conviction

that Congress meant precisely what it said when it used these words (40 Stat. 284):

> said authority and power *may* be exercised by him in each case * * * through * * * the Federal Trade Commission. (Italics ours.)

The same conclusion was reached by the District Court for the Western District of Pennsylvania in *United States* v. *Pennsylvania Central Coal Co.*, 256 Fed. 703.

Furthermore, the construction of the Act here urged was adopted and consistently followed by the Executive and Legislative branches of the Government.

The President, to whom the execution of the Lever Act was committed, was, of course, bound to place some construction on it for the purpose of determining what authority and power it conferred on him. His appointment of Doctor Garfield is conclusive evidence that he construed it as conferring upon him power to fix prices of coal and coke independently of the Federal Trade Commission, and also authority to delegate that power.

After the Executive order of August 23, 1917, appointing Doctor Garfield, he acted as United States Fuel Administrator, fixing prices of coal and coke, and regulating the method of production, sale, shipment, distribution, and apportionment thereof, and created the organization known as the United States Fuel Administration.

In and by the Act of Congress entitled "An Act making appropriations for sundry civil expenses of

the Government for the fiscal year ending June thirtieth, nineteen hundred and nineteen, and for other purposes," approved July 1, 1918 (40 Stat. c. 113, pp. 634, 648), Congress appropriated the sum of $3,500,000 "for expenses of the United States Fuel Administration created under authority contained in the Act entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' " approved August 10, 1917, thus expressly recognizing the legality of Doctor Garfield's appointment to fix the prices of coal and coke and regulate the business of producing and dealing in the same, and the standing of the United States Fuel Administration as a duly and legally constituted Government agency.

Even if it were conceded that a doubt exists whether, as an original question, such construction ought to have been placed on the statute, the fact that the act has been so construed by the President and by Congress should be controlling.

While it is true that the interpretation of statutes is a judicial question, the principle that the contemporaneous construction placed upon a statute by those officers whose duty it is to execute it is entitled to great and, in case of doubt, to controlling weight in the courts. It received early recognition in the Supreme Court and is well established by the later decisions.

Under our system an interpretation can be given to a statute by a court only when the question arises in some litigated case. This may never occur, or if it does, may not occur for a considerable period, during which the executive branch of the Government must proceed with the enforcement of the law according to its own interpretation, and thus give rise to rights of property or contract which will be jeopardized or destroyed unless the Executive interpretation is sustained. It is for this reason that in some of the cases the element of the time during which the practical construction has continued is regarded as important. But it is manifest that the fact that Executive practice has been long continued is only important as it increases the extent to which a disturbance of the practice would injuriously affect private or public rights acquired under it.

In the case of the Lever Act, the intensive character of its enforcement evidently renders the element of time important. Millions of people have been directly and palpably affected by what has been done under its authority. The overwhelming majority of both dealers and consumers of fuel have acquiesced in good faith in the decisions and orders of the Fuel Administrator. The entire fuel business of the country was remodeled in obedience to his regulations. Industries were profoundly affected and they readjusted their plans to the situation created by the existence of the Fuel Administration, and these plans

and thousands of contracts depended upon the validity of its regulations.

If five decisions of the Interior Department were sufficient in *United States* v. *Hammers*, 221 U. S. 220, 225, to create rights which made the practice of the Interior Department "determinatively persuasive" in the Supreme Court, it is submitted that there can be no question of the controlling character of the practice of the Executive department under the Lever Act.

A further reason for the rule is to be found in the fact that the Legislature is presumed to know the construction placed upon the statute by the officers charged with its execution, and its acquiescence in that construction is presumptive evidence that those officers are carrying out its intention.

In the case at bar it is unnecessary to resort to a presumption. By the appropriation referred to above, Congress has unequivocally indorsed not only the action of the President in appointing a Fuel Administrator, but that officer's action in creating and organizing the Fuel Administration.

This statute should be liberally construed. Although it imposes a penalty in case of its violation, it is not a penal statute, but highly remedial. Its purpose is not to define a criminal offense and prescribe a punishment therefor, but "to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel including fuel oil and natural gas," etc. (40 Stat. 276.)

Thus it falls within the rule announced in *Taylor* v. *United States*, 3 How. 197, in the following language (p. 210):

> In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. The judge was therefore strictly accurate, when he stated that "It must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. *Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them.*" (Italics ours.)

The Lever Act is manifestly a law of the class here described—a law enacted for the suppression of a public wrong and to effect a public good, and it should be construed so as most effectually to accomplish that purpose. Under such construction the President had power to fix jobbers' margins without the aid of the Federal Trade Commission; and the indictment in this case was sufficient.

B.

The allegations of the indictment are definite and certain.

The indictment charged the defendant with adding a "profit or gross margin" in excess of 15¢ per ton.

Counsel argue (Brief, 32–37) that the word "profit," as used in the indictment, means "net profit"; that the use of it in conjunction with "gross margin" renders the indictment indefinite and uncertain; and, further, that the defendant was entitled to acquittal because the Government failed to show that he made any net profit.

The term "profit," without qualifying words, has a variety of meanings, as any business man or accountant will attest. It gathers its precise signification from its adjective complements and its context. This is true, not only of this word but of many, and is a fact generally and commonly known. As used in this indictment it can derive its precise meaning only from the words "gross margin," which are three times used in conjunction with it. They are connected by the correlative "or," which unmistakably imports that the one is to be deemed the synonym of the other. If the term "profit" be so qualified as to mean "gross profit," as the trial court very properly held should be done (Rec. 47), then the meaning of the charge laid in the indictment is clear and unambiguous.

Counsel have cited cases which hold "profit" to mean "net profit." Others could be cited which hold that it means "gross profit." All would alike be without authority in this case, for the term gathers its meaning from the associated words, and those words which render its meaning precise and definite *in this case* are the words of *this indictment*.

To assume that "profit" here could be misunderstood to mean "net profit" or that the correlative "or" is here used to connect alternatives, would be an affront to the intelligence of the defendant or of anyone fairly conversant with the English language.

IV.

The Executive order was not a taking of property without due process of law in violation of the Fifth Amendment.

The defendant contends that the President's order, made without the cooperation of the Federal Trade Commission, constituted a taking of its property without due process of law; and that section 25 of the Lever Act, under authority of which the order was made, was unconstitutional and void because in contravention of the Fifth Amendment. The particular reasons urged are that the act made no provision for notice to the defendant and a hearing prior to the making of the order, gave it no right of appeal to any judicial body, provided no means for determining whether the margin allowed was compensatory, and no means whereby the damages which it claims to have suffered might be adjudicated.

The Act, and the President's order made in pursuance of it, are justified, if at all, as a proper and reasonable exercise of the war power of the United States.

The contention, striking as it does at an essential exercise of the Nation's war power, and at the same time made on behalf of the property rights of the

individual so carefully safeguarded by the Constitution, challenges a searching inquiry into its merits.

A.

The Executive order was valid, regardless of whether the defendant could conduct his business profitably thereunder. Congress, in the exercise of the war power, may control and regulate or may prohibit and destroy the business of trading in coal.

The Constitution of the United States vested in Congress the power (Article I, section 8):

> (11) To declare war * * *.
>
> (12) To raise and support armies * * *.
>
> (13) To provide and maintain a Navy * * *.
>
> (14) To make rules for the Government and regulation of the land and naval forces.
>
> (15) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.
>
> (16) To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the Service of the United States * * *.

and

> (18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

At the same time it completely divested the States of their power (Article I, section 10) to—

> engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

The history of the desperate struggle to keep and maintain the Continental Army, so familiar to all, and so vivid in the minds of the framers of the Constitution, leaves no doubt of their purpose and intention to vest in the Federal Government plenary power to wage war. The war power is one "upon which the very life of the Nation depends." (Mr. Justice Brandeis in *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, 163.) It is the Nation's power of self-preservation. It is analogous to and has many of the incidents of the police power of the States.

> That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose. * * * If the nature and conditions of a restriction upon the use or disposition of property is such that a State could, under the police power, impose it consistently with the Fourteenth Amend-

> ment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation. (Mr. Justice Brandeis in *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, 156.)

The war power can not be limited by contract or bargained away by Congress. It is seldom called into use, but when circumstances require it, its exercise is not fettered or limited save by the rule of reasonable necessity. It is not a new power created or brought into being by a state of war or other grave emergency. It is a power which exists at all times, though latent. It lies like a burnished sword at the hand of the Federal Government ready for instant use; and the life, liberty, and property of citizens are possessed and enjoyed subject to the implied limitation placed upon them by its existence. The mere existence of a state of war or the exercise of the war power do not of themselves suspend or limit constitutional guaranties, but they do cause "limitations, which the Constitution made applicable as the necessary and appropriate result of the status of war, to become operative." (Mr. Chief Justice White in *United States* v. *Cohen Grocery Company*, 255 U. S. 81, 87.)

> Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.

> (Mr. Chief Justice White in *Wilson* v. *New*, 243 U. S. 332, 348.)

It is of course clear that neither the existence of a state of war nor the exercise of the war power can justify the slightest interference with individual rights guaranteed by the Constitution, in any matter which is not reasonably necessary and appropriate for the successful prosecution of a war. It is equally clear that in a matter which is essential to the efficient prosecution of a war the exercise of the Federal power is paramount over the rights of the individual. (*Miller* v. *United States*, 11 Wall. 268; *Stewart* v. *Kahn*, 11 Wall. 493, 506.) The right of self-preservation without the power to do that which may be reasonably necessary to make it effective would be a mockery.

> That the safety of the Republic is the first law, is as true now as when the Romans so declared. (*United States* v. *Pennsylvania Central Coal Company*, 256 Fed. 703, 705.)

The views which we have just expressed concerning the nature and extent of the war power are sustained by the recent decisions of this Court. Ordinarily, the individual is secure from interference by the Government in the enjoyment of personal liberty. Yet, under the war power, the United States may lay its hand upon him, interrupt his pursuit of a pleasant and remunerative occupation, place him under the strict discipline of a military camp, transport him beyond the seas, expose him to the shot and shell of the enemy, and compel him to exert his energy and

talents exclusively in the business of killing human beings. That this is a restraint of his personal liberty can not be denied, but throughout his life the citizen lives subject to the possibility that this restraint may be imposed. He is merely called upon to fulfill an obligation which always was his and the call is recognized as lawful, proper, justified, and constitutional. (*Selective Draft Law Cases*, 245 U. S. 366.)

The use of property also has been limited by the exercise of the war power. (*Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146; *Ruppert* v. *Caffey*, 251 U. S. 264; *McKinley* v. *United States*, 249 U. S. 397.) And the right which the individual ordinarily has to discuss war and peace, the naval and military policies of the Nation, and the official Acts of Congress, the Cabinet and the Courts, has been curtailed by limitations placed upon it which this Court has recognized as consistent with the Constitution. (*Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211.)

That war can not be successfully waged without men, munitions, supplies, and a Nation with the "will to win," opens another field in which the war power may constitutionally operate to restrain the free use of property and the peace time liberty of contract. The Government may control and regulate those products of husbandry and of industry which are essential to supply the Army and Navy and to main-

tain the people. Such products are appropriately designated in the Lever Act as "necessaries" and include food, fuel, and munitions.

The World War was not merely a struggle between contending armies and navies but a contest between peoples. Success depended not only upon raising and maintaining the militant forces but was dependent also upon the maintenance of reasonably stable and satisfactory economic, industrial, and social conditions among the noncombatants. The mental, moral, and spiritual attitude of the people toward the war was recognized as being of vital importance. Every nerve was being strained in the effort so to marshal our great strength and resources that they might prove effective upon the field. Millions of men were withdrawn from the accustomed pursuits of peace and their labor expended entirely in the prosecution of the war. Due to unparalleled demands for food and fuel, these necessaries became the subject of widespread and unrestrained speculation. A constantly rising market encouraged hoarding. The effect of such practices upon the morale of the people threatened danger if not disaster.

In this situation, coal, which was one of the principal "necessaries," was clothed with a public interest which made its production, transportation, sale, distribution, and use the proper subject of regulation by the Federal Government.

> When private property is affected with a public interest, it ceases to be *juris privati* only. (*Munn* v. *Illinois*, 94 U. S. 113, 126.

See also *Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Holding Company* v. *Feldman*, 256 U. S. 170; *Levy Leasing Company* v. *Siegel*, 258 U. S. 242.)

Property which by reason of its public interest has become subject to regulation under the police power (and the war power) is of two general classes—that which is fraught with such danger to the public that it may be destroyed without compensation, and that which by a mild form of public control may be made to render invaluable service. A house may be dynamited if it be in the path of a conflagration and its destruction be an appropriate means of preventing further spread of the fire; dogs and other animals in which a right of property is recognized may be destroyed; liquor and narcotics may be seized and confiscated; the business of dealing in liquor or oleomargarine may be forbidden; the use of property exclusively adapted to the production of these commodities may be destroyed; and all of this without any compensation to the owner. These are recognized as reasonable exercises of the police power.

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not, and, consistently with the existence and safety of organized society, can not be, burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted, by a noxious use of their

property, to inflict injury upon the community. (Mr. Justice Harlan in *Mugler* v. *Kansas*, 123 U. S. 623, 669. See also *Powell* v. *Pennsylvania*, 127 U. S. 678, 683.)

On the other hand, the well-established control of public utilities furnishes an illustration of that other class of property which the State may regulate, but must preserve. (*Smyth* v. *Ames*, 169 U. S. 466.)

Whether property, or a business, or a right to contract be of such a character that the public welfare requires its destruction, is a question to be determined in the first instance by the legislative body which sits as a general assize of the public's needs. Its determination, though subject to review by the courts, is entitled to great weight. The Lever Act (Sec. 25, paragraphs 6–10) placed the business of trading in coal within this class. It gave the President power to establish an agency which might purchase all coal produced throughout the country and arrange for its distribution and sale. The establishment of such an agency would have destroyed *eo instanti* the jobber's business.

There can be no doubt that the conditions existing in the summer of 1917 justified Congress in enacting this provision. The market for bituminous coal, having gradually risen from a relative price of 94 in 1915 to 140 in 1916, shot up to 297 in June, 1917. Every transaction by a middleman tended to inflate prices. Under the practices then obtaining, the jobber's business was rapidly becoming noxious. Its total destruction without compensation would

have been fully justified as a constitutional exercise of the war power. *A fortiori* it was subject to the milder regulation of a fixed margin, regardless of whether such margin allowed a jobber to conduct his business profitably. The many rate cases cited by counsel for the petitioner furnish no precedents applicable here, for we are dealing with business and property of a different character.

Though the war power will not justify the taking of private property without compensation, it will justify a necessary restraint upon the use of property or the conduct of a business. The President's order, being equal, uniform, and nondiscriminatory in its operat on, was constitutional, whether the margin fixed allowed a profit or not.

B.

If it be necessary that the jobber's margin be a profitable one, nevertheless the ascertainment of that fact by judicial process is not essential to due process of law.

If, however, we were to concede that Congress and the President were obliged to fix a price or margin which would allow the defendant a profit, the statute and order are none the less constitutional. Due process of law does not always demand judicial process.

In its broadest scope due process of law guarantees to the individual that his life, liberty, and property shall not be interfered with excepting in such respects, by such authority, and in such manner as is sanctioned by the settled usages and modes of proceeding

existing in the common and statute law of England at the time of the organization of our Government, and which are not unsuited to our civil and political system. (*Munn* v. *Illinois*, 94 U. S. 113; *Lowe* v. *Kansas*, 163 U. S. 81; *Twining* v. *New Jersey*, 211 U. S. 78, 101.) "The constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is." (Cooley, J., in *Weimer* v. *Bunbury*, 30 Mich. 201, 213.)

What is due process depends upon the circumstances of the particular case. There is probably no governmental regulation which does not in some manner interfere with the liberty of the individual or affect the use of his property. Nevertheless, if it be imposed by that authority having power to make such regulations, if it be equal and uniform, and if it be reasonably appropriate to effect a legitimate public purpose, it is justified and constitutes due process of law. There are many cases in which this Court has recognized that due process of law does not require a judicial proceeding.

The power of Congress and of the legislatures of the States to fix a certain number of hours which persons may work without detriment to their health and in justice to their employers is recognized, although no provision be made before or after the enactment of the statute for a judicial inquiry into the facts concerning individual employers or employees. (*Muller* v. *Oregon*, 208 U. S. 412; *Wilson* v. *New*, 243 U. S. 332.) The fixing of a maximum rate

of interest which persons may charge for the use of money is a familiar example of price fixing by the legislature without provision for judicial inquiry. (*Morley* v. *Lake Shore & Mich. So. Ry. Co.*, 146 U. S. 162.)

In *Public Clearing House* v. *Coyne*, 194 U. S. 497, Mr. Justice Brown said (p. 508):

> It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. (*Bates and Guild Company* v. *Payne*, 194 U. S. 106.) That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. (*Murray's Lessee* v. *Hoboken Company*, 18 How. 272, 280; *Bushnell* v. *Leland*, 164 U. S. 684.) As was said by Judge Cooley in *Weimer* v. *Bunbury*, 30 Mich. 201: "There is nothing in these words, ('due process of law') however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the Government is carried on and the order of society maintained is purely

executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress." If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the Courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the Government.

In a variety of cases, this Court has held that Executive orders and decisions which affect liberty and property are due process of law.

Murray's Lessee v. *Hoboken Land Co.*, 18 How. 272 (determination of amount due from defaulting revenue collector and summary process for collecting same).

Burfenning v. *Chicago, etc., Ry. Co.*, 163 U. S. 321, 323; *Smelting Co.* v. *Kemp*, 104 U. S. 636 (determination of issues of fact by officers of the Land Department).

Springer v. *United States*, 102 U. S. 586 (collection of taxes by summary process).

Ex parte Wall, 107 U. S. 265 (disbarment of an attorney).

Parsons v. *District of Columbia*, 170 U. S. 45 (assessment of benefits against property).

Buttfield v. *Stranahan*, 192 U. S. 470 (exclusion of goods from import).

Bates & Guild Co. v. *Payne*, 194 U. S. 106 (exclusion of matter from second-class mail).

Moyer v. *Peabody*, 212 U. S. 78 (imprisonment without trial in time of insurrection).

Turning to the matter of the regulation of prices of essential commodities, we find that in England prior to the organization of our Government price fixing was a well-recognized function of the law-making power, which it might exercise directly or through administrative officers.

The Statute of Laborers, passed in 1349 (2 Stat. of England, c. VI, pp. 26, 28), provided that all sellers of victuals should be bound to sell them "for a reasonable price, having respect to the price that such victual be sold at in the places adjoining, so that the same sellers have moderate gains, and not excessive." The Statute of Herrings (1357) (2 Stat. of England, p. 117) fixed the price of herrings. The Statute of 1363 (2 Stat. of England, p. 162), in chapter 5, after reciting that grocers engross all manner of merchandise by combination in guilds, selling that which is most dear and keeping in store the other, it was provided that a merchant should deal in only one kind of merchandise. By chapter 3 of the same statute the price of poultry was fixed, and by chapter 15 the prices of clothes. In 1389 justices of the peace were authorized to fix wages according to circumstances, and it was provided that victuallers "shall have reasonable gains, according to the discretion and limitation of said justices, and no more, upon pain to be grievously punished." (2 Stat. of England, c. 8, pp. 313–314.) In 1433 the price of candles was fixed by the price of plain wax. (3 Stat. of

England, c. XII, p. 196.) In 1487 the prices of cloths and hats were fixed by a maximum rate. (4 Stat. of England, c. VIII, IX, p. 41.) In 1531 brewers were prohibited from charging higher prices for ale and beer "than shall be thought convenient and sufficient by the discretions of the justices of the peace within every shire" or by the officials of cities, boroughs, and towns. (4 Stat. of England, c. V, p. 220.) In 1533 it was provided that whenever complaint was made of enhancing the price of victuals certain State officials should have power from time to time "to set and tax reasonable prices of all such kinds of victuals." (4 Stat. of England, c. II, pp. 263, 264.) In 1536 certain officials were authorized to set the price of wines. (4 Stat. of England, c. XIV, p. 439.) In 1549 all persons were prohibited from buying butter and cheese to sell again, unless they sold by retail in open market. (5 Stat. of England, c. XXI, p. 347.) In 1709 the price of bread was fixed by the price of wheat. (12 Stat. of England, c. XVIII, p. 77.) Numerous other similar statutes could be cited, but the above sufficiently illustrate governmental practices under the common law.

The defendant's contention was fully met by the Circuit Court of Appeals with the proposition that—

> due process of law is not to be tested by form of procedure merely; that public danger warrants the substitution of executive processes for judicial process (*Moyer* v. *Peabody*, 212 U. S. 78, 84); and that under the war condi-

> tions then existing, and as indicated by the preamble of the act, the fixing of prices in industries so vital to the prosecution of the war as food and fuel was not the deprivation of due process of law, but is within the power given to Congress by Article I, section 8, of the Constitution, to make all laws necessary and proper for carrying into execution the war powers expressly enumerated. (Rec. 88.)

The principal reason why in certain cases executive or administrative process may be substituted for judicial process is that the latter is not practicable. (*Weimer* v. *Bunbury*, 30 Mich. 201; *Hagar* v. *Reclamation Dist.*, 111 U. S. 701, 708.) It is not suited to the making of those adjudications which in order to be effective must be made promptly nor is it appropriate where the number of cases which may arise is multitudinous. In the collection of the public revenue, for example, it is absolutely essential that levies shall be made promptly and collected with dispatch, otherwise the operations of the Government may be seriously interfered with. In the matter of excluding individuals or commercial products from the country it is essential that adjudications be made promptly and decisively, else the ports of the country would become hopelessly blocked. In the matter of fixing prices for necessary commodities it is absolutely essential that there be reposed in some executive official or department the power to fix prices speedily, otherwise the injury to the public resulting from unstable markets could not be avoided. Further-

more, it would be utterly impracticable to provide a judicial means whereby in each commercial transaction it might be determined whether the price allowed were profitable to the seller. When we pause to consider that whenever among a hundred millions of people a loaf of bread, a sack of flour, a pound of sugar, a gallon of oil, or a ton of coal was sold during the war the prices fixed under authority of the Lever Act might be applicable—and that in each and every instance the seller might demand a judicial investigation to determine whether the prices fixed by the Government were profitable—the staggering multitude of such possible actions conclusively demonstrates the impracticability of providing judicial process as a shield for the protection of private rights. We are driven to the conclusion that the necessities of the case demanded and required the establishment of a price by administrative order; and that such order, made under authority of Congress and the President, and being equal and uniform in its operation upon all, did not deprive anyone of property without due process of law. Any attempt to apply judicial process to the adjudication of such cases would result in hopeless confusion.

Moreover, when we examine the particular order here in question we find that it was not arbitrarily and unreasonably made without regard to the question of whether it would allow a profit. The President's order did not fix the price at which the jobber should sell his coal. He fixed a margin which might in each instance be added to the purchase price. In the

business of trading in coal the largest factor of expense is the purchase price of the coal. This the President permitted in all cases and added to it a margin which from all the information obtainable he believed was sufficient to cover a jobber's reasonable operating expenses and profit.

C.

The Lever Act and the Executive order did not take the defendant's property.

We have already observed that the power exercised by Congress in the enactment of the Lever Act was the war power. In establishing a price or margin which might be charged for coal, the Congress was not exercising the power of eminent domain. It was not taking property for public use nor was it condemning the property of one person and turning it over to another. It was merely laying down a rule of conduct, fixing and prescribing the conditions under which a business, fraught with great import to the public, might be legitimately conducted.

That it restricted the right of the individual to contract freely may be admitted. But this is not a taking of property. The right of contract is "subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good. This Court has said that 'in every well-ordered society charged with the duty of conserving the safety of its

members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.' *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29, and authorities there cited." (*Adair* v. *United States*, 208 U. S. 161, 172.)

In *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, it was held that the war-time prohibition act, which very seriously limited the use of breweries and distilleries, was not a taking of property. And in *Ruppert* v. *Caffey*, 251 U. S. 264, the same conclusion was reached with respect to beer which had already been lawfully manufactured and was ready for immediate sale. In the latter case Mr. Justice Brandeis said at p. 303:

> Here, as in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *supra*, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use.

With respect to the beer already manufactured and ready for immediate sale, it was said (p. 301):

> Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the lawmaking body.

The defendant had no vested right in any profits which might accrue to it from the sale of coal. The market was abnormal and Congress, by the Lever Act,

merely destroyed the noxious use of property and prevented its being handled and dealt with in such manner as to inflict injury upon the public. In so doing it exercised the war power, not the power of eminent domain, and the interference, if any, with private rights was merely incidental to the necessary public regulation.

V.

The Lever Act did not delegate legislative or judicial power in violation of the Constitution.

In *Wayman* v. *Southard*, 10 Wheat. 1, 42, 43, Mr. Chief Justice Marshall said:

> It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly nnd exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.

It is the function of Congress to determine and to declare general policies. It also has the power to prescribe the precise form and method by which they shall be administered. The former power is exclusively legislative and can not be delegated, but the latter may lawfully be committed to administrative officers, boards, or commissions. To deny this power to the Government to-day would make of Congress a Cabinet; and would "stop the wheels of Government."

A few instances will suffice to show that this principle is well settled.

In *Field* v. *Clark*, 143 U. S. 649, it was held that an Act of Congress which gave the President the power to suspend by proclamation the free introduction of sugar, molasses, etc., was valid.

In *United States* v. *Grimaud*, 220 U. S. 506, an Act which gave to the Secretary of Agriculture the power to "make such rules and regulations and establish such service as will insure the objects of such [forest] reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction," and which provided that "any violation of the provisions of this act *or such rules and regulations* shall be punished," was sustained against the objection that it gave the Secretary the power to legislate. Mr. Justice Lamar, speaking for the Court, said (p. 517):

> From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

In *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, an Act of Ohio which provided that "only such films as are in the judgment and discretion of the Board of Censors of a moral, educational or amusing and harmless character shall be passed and approved by such Board," was declared to be a lawful and proper delegation of power to the Board of Censors.

"In *Union Bridge Company* v. *United States*, 204 U. S. 364; *In re Kollock*, 165 U. S. 526; *Buttfield* v. *Stranahan*, 192 U. S. 470, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate, the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations, the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But, confining themselves within a field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect." (*United States* v. *Grimaud*, 220 U. S. 506, 518.)

Congress provided that after a given date only cars with draw bars of uniform height should be used in interstate commerce, and then constitutionally left to the Interstate Commerce Commission the administrative duty of fixing a uniform standard. (*St. Louis & Iron Mountain Railway* v. *Taylor*, 210 U. S. 281, 287.)

Congress has declared that it is unlawful for common carriers in interstate commerce to charge unreasonable rates or to discriminate between shippers, and has given to the Interstate Commerce Commission authority to determine what are reasonable rates and what are discriminatory practices. This power has been sustained. (*Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S. 452; *Interstate Commerce Commission* v. *Chicago, Rock Island, etc., Railroad*, 218 U. S. 88.) The same is true of acts of the State legislatures delegating like power to public-service commissions. (*Wichita Railroad & Light Company* v. *Kansas*, 260 U. S. 48.)

All of these cases, but more particularly the rate cases last cited, sustain the power of Congress to delegate to the President the power to fix prices of necessary commodities. The first section of the Lever Act (40 Stat. 276) declared that "it is essential to the National Security and Defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, fuel,

* * *; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement." Here the legislative power has declared its policy and has enumerated those evils which, by administration of the act, are to be avoided. It has further declared that one of the means of accomplishing the purposes of the act shall be the regulation of prices. Having gone this far, Congress has itself exercised that power which was exclusively legislative. What was committed to the President was merely the administrative power to carry out the policy declared in the act. In this there is no unconstitutional delegation of legislative power.

VI.

The Lever Act was not an abuse of the congressional power to provide for the national security and defense, nor was it an invasion of the reserved powers of the States.

It is urged by the defendant that Congress exceeded the lawful scope of its war power when it attempted, by the Lever Act, to control and regulate the price of coal. (Brief, pp. 63–66.) This objection scarcely merits serious consideration. That coal is a necessary commodity not only for the maintenance of the Army and Navy but for the maintenance of the life and health of the people during a war, and that the control of its sale and distribution is as vital as control of its production, are axioms.

An attempt to stabilize the coal market, to prevent monopolization and speculation, without the power to fix prices, would be as abortive as an attempt of the Interstate Commerce Commission to regulate the business of the railroads without the power to fix rates.

Nor does the objection that the Lever Act violates the Tenth Amendment, by interfering with the reserved powers of the State, merit any extended discussion. It is true that aside from the war power Congress has no constitutional authority to fix the price of coal and that this authority, if it exists at all in peace times, is reserved to the States. The same thing was true of the regulation of the liquor traffic prior to the Eighteenth Amendment. Nevertheless, Congress under the war-time prohibition acts exercised complete control over it. In *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, it was said at p. 156:

> That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose.

The regulation of the prices of necessaries being within the war power of Congress, the exercise of this power is not an invasion of the powers reserved to the States, although in peace time the States alone may exercise such authority.

CONCLUSION.

We respectfully submit:

1. That although the defendant purchased its coal on July 31, 1917, the Executive order of August 23, 1917, applied to all sales of that coal which were made after the latter date.

2. That the evidence offered by the defendant during the trial for the purpose of proving that the gross margin fixed by the order of August 23 would not allow it any profit was properly excluded.

3. That the President had power to fix jobbers' margins without the aid or cooperation of the Federal Trade Commission, and that the term "profit," as used in the indictment, is equivalent to gross margin. Accordingly, the indictment was sufficient.

4. That the Executive order was valid regardless of whether the defendant could conduct his business profitably thereunder, and that even if it were otherwise, the ascertainment of that fact by judicial process was not essential to due process of law; wherefore the act of Congress and the President's order were not unconstitutional as a taking of property without due process of law.

5. That the Lever Act did not delegate legislative power, but merely provided for administrative regulation.

6. That the Lever Act was not an abuse of the war power, nor an invasion of those rights reserved to the States by the Tenth Amendment.

The judgment of the Court below should be affirmed.

GEO. ROSS HULL,
Special Assistant to the Attorney General.

SEPTEMBER, 1923.

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